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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 KEVIN LEE HILTON,

8 Petitioner,

9 v.

10 JAMES KEY,

11 Respondent.

NO. 2:16-CV-0383-TOR

ORDER DENYING PETITIONER'S
WRIT OF HABEAS CORPUS

12 BEFORE THE COURT is Petitioner Kevin Lee Hilton's Petition for Writ of
13 Habeas Corpus. ECF No. 1. Respondent James Key has answered the Petition and
14 filed relevant portions of the state court record. ECF Nos. 15–23. The Court has
15 reviewed the record and files herein, and is fully informed. For the reasons
16 discussed below, Kevin Lee Hilton's Petition for Writ of Habeas Corpus (ECF No.
17 1) is **DENIED**.

18 **BACKGROUND**

19 On October 31, 2016, Petitioner Kevin Lee Hilton filed a Petition for Writ of
20 Habeas Corpus. Mr. Hilton, a prisoner at the Airway Heights Corrections Center,

1 is challenging his Benton County jury convictions for two counts of aggravated
2 first degree murder. ECF Nos. 1 at 1; 16-1 at 2. The underlying facts and
3 procedural history, summarized by the Washington Court of Appeals on direct
4 appeal, are as follows:

5 Lisa Ulrich discovered her parents' bodies in their Richland home
6 shortly after 9:00 a.m. on March 21, 2002. Autopsies determined that
7 they had been killed the evening before. There was no sign of forced
8 entry. Both had been shot by a .45 caliber handgun.

9 Five .45 caliber bullets were recovered from the victims and their
10 house. Police discovered three .45 caliber "A-Merc" brand shell
11 casings at the scene. Knowing the brand to be uncommon, a detective
12 began investigating local gun shops to see which of them sold that
13 ammunition and to whom.

14 The Ulrichs were longtime landlords who owned seven residential
15 rental properties in Richland at the time of their deaths. Clashed in
16 Mr. Ulrich's hand was a yellow note folded to conceal a rent receipt
17 for Kevin Hilton in the sum of \$3,475, representing the total of several
18 months of back rent he owed the Ulrichs. A file folder containing Mr.
19 Hilton's rental documents was found on top of the couple's
20 refrigerator. It contained a three-day, pay-or-quit notice dated March
15, 2002 directed to Mr. Hilton. The receipt book was missing, as
was the kitchen telephone handset. The missing telephone had a
caller identification (ID) feature. The caller ID feature on an upstairs
telephone showed that the last telephone call had been from Kevin
Hilton at 6:42 p.m. on March 20.

Police contacted all of the Ulrichs' tenants on March 21 except for
Mr. Hilton. Officers were able to make contact with him the next day;
he invited them into his duplex. He explained his whereabouts on the
night of the murder—he had shopped for groceries at Winco, returned
the book Hard Time to the Richland library, and then gone to
volleyball practice. He also told them that he owed the Ulrichs
\$3,475, but they had reached an agreement over the telephone on
March 20th on a plan to pay the rent. Police also learned that Mr.

1 Hilton owned several rifles and engaged in competitive shooting
2 events. He said he had previously owned four handguns, including
3 two Norinco .45 caliber handguns. He said that he had sold one
4 Norinco to Dirk Leach and the other to someone at a gun show in
5 Walla Walla six to eight months earlier.

6 Police later served a search warrant on Mr. Hilton's duplex. They
7 discovered some used .45 caliber A-Merc shell casings as well as
8 receipts from Schoonie's Rod Shop for A-Merc .45 caliber
9 ammunition. Testing determined that the shell casings had been fired
10 from the same gun used to kill the Ulrichs. The murder weapon was
11 never located.

12 The prosecutor ultimately filed two charges of aggravated first degree
13 murder against Mr. Hilton. The case proceeded to jury trial in 2003.
14 Mr. Hilton did not testify in that trial. The jury found him guilty as
15 charged. He then appealed to this court.

16 This court determined that the search warrant for the duplex, which
17 had uncovered the matching A-Merc shells, was invalid due to lack of
18 specificity to guide officers in their search. Because the matching
19 shells were very significant incriminating evidence, the convictions
20 were reversed. *State v. Hilton*, No. 22116-4-III (Wash. Ct. App. Jan.
26, 2006), review denied, 158 Wn.2d 1027 (2007).

The case was scheduled for retrial

The State also moved in limine to prohibit the defense from accusing
Lisa Ulrich of committing the murders. Defense counsel advised the
court about numerous topics that Lisa Ulrich had been cross-examined
about during the first trial and indicated that the defense intended to
again cover those areas. He did not want the third party perpetrator
ruling to limit those areas of inquiry. RP at 201-204. Defense
counsel then concluded his argument:

So, minimally, I think the court should allow what was allowed
last time in terms of cross-examination. We don't characterize
that as other party perpetrator evidence, and we're entitled to do
it under the rules of cross-examination.

1 RP at 205. The trial court ruled that third party perpetrator evidence
2 would be excluded

3 Although the receipts seized from Mr. Hilton's duplex and the
4 matching casings had been suppressed, the prosecutor still sought to
5 admit evidence that Mr. Hilton had purchased A-Merc .45 caliber
6 bullets. The trial court ruled that the Schoonie's Rod Shop owner
7 could testify and her records of the sales could be admitted at trial.
8 The court reasoned that the evidence was admissible under either the
9 inevitable discovery or independent source doctrines. Clerk's Papers
10 (CP) at 26.

11 Unlike the first trial, Mr. Hilton testified on his own behalf in the
12 second trial. Typically without objection, the prosecutor was
13 permitted to question Mr. Hilton about the fact that he was familiar
14 with the discovery and prior testimony. The prosecutor also argued in
15 closing that Mr. Hilton had tailored his alibi testimony to fit the
16 State's evidence.

17 The jury found Mr. Hilton guilty of both counts of first degree murder
18 and also found that both offenses were committed with the
19 aggravating factor that there were multiple killings committed as part
20 of a common scheme or plan. He was sentenced to life in prison
without possibility of parole. He then timely appealed to this court.

ECF No. 16-1 at 14–19 (Ex. 2).

The Washington Court of Appeals affirmed Petitioner's conviction and
sentence on September 27, 2011. *Id.* at 63. Petitioner then filed a petition for
review in the Washington Supreme Court. ECF No. 16-2 at 152 (Ex. 11). On
April 27, 2012, the Washington Supreme Court denied review. ECF No. 17-1 at
30 (Ex. 13).

1 On September 18, 2013, Petitioner filed a personal restraint petition in the
2 Washington Court of Appeals. *Id.* at 32 (Ex. 14). On October 20, 2015, the
3 Washington Court of Appeals thoroughly addressed Petitioner's issues and
4 dismissed his personal restraint petition. ECF No. 16-1 at 65 (Ex. 3). Petitioner
5 then moved the Washington Supreme Court for discretionary review, which was
6 denied on November 2, 2016. ECF No. 17-3 at 93 (Ex. 21).

7 Petitioner filed this federal 28 U.S.C. § 2254 habeas petition on October 31,
8 2016, generally alleging four grounds for relief: (1) denial of due process for false
9 or misleading evidence and argument; (2) denial of due process in violation of
10 *Brady*; (3) ineffective assistance of counsel; and (4) denial of his constitutional
11 right to present a defense and due process. ECF Nos. 1 at 2; 9 at 1–9.

12 This Court granted Petitioner's Unopposed Motion to Expand the Record.
13 ECF Nos. 35; 50. Petitioner sought to conduct discovery and hold an evidentiary
14 hearing, specifically regarding Detective Simon Mantel's report. ECF No. 36.
15 This Court denied the motion and thus will not consider Petitioner's argument for
16 an evidentiary hearing in this order. ECF Nos. 51; 34 at 2–4. This Court does not
17 consider evidence that was excluded as a matter of law from the second trial. *See*
18 ECF No. 34 at 5. The parties agree that Petitioner properly exhausted his state
19 court remedies. ECF Nos. 15 at 15; 34 at 1.

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DISCUSSION

A court will not grant a petition for a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court proceedings unless the petitioner can show that the adjudication of the claim “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). Section 2254(d) sets forth a “highly deferential standard for evaluating state-court rulings which demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (citation omitted).

I. Unreasonable Determination of the Facts

Petitioner disputes the facts recited in the state court proceedings. 28 U.S.C. § 2254, however, requires the Court to consider the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2); *see also* ECF No. 34 at 20. As to factual determinations, the Supreme Court has instructed that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). This means that evidence not presented to the state court may not be introduced on federal habeas review if a claim was adjudicated on the merits in state court and if

1 the underlying factual determinations of the state court were reasonable. *See*
2 *Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014) (“After *Pinholster*, a
3 federal habeas court may consider new evidence only on de novo review, subject
4 to the limitations of § 2254(e)(2).”). Two separate statutory subsections govern a
5 federal court’s review of state court factual findings:

6 Factual determinations by state courts are presumed correct absent
7 clear and convincing evidence to the contrary, § 2254(e)(1), and a
8 decision adjudicated on the merits in a state court and based on a
9 factual determination will not be overturned on factual grounds unless
objectively unreasonable in light of the evidence presented in the
state-court proceeding, § 2254(d)(2).

10 *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citation omitted); *see also Schriro*
11 *v. Landrigan*, 550 U.S. 465, 473–74 (2007). Importantly, a “state-court factual
12 determination is not unreasonable merely because the federal habeas court would
13 have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S.
14 290, 301 (2010). “The question under AEDPA is not whether a federal court
15 believes the state court’s determination was incorrect but whether that
16 determination was unreasonable—a substantially higher threshold.” *Schriro v.*
17 *Landrigan*, 550 U.S. at 473.

18 Because the relationship between § 2254(d)(2) and (e)(1) is not entirely
19 clear, the Supreme Court in *Wood v. Allen* granted certiorari to resolve the
20 question, but in the end declined to address any interpretive difference and left the

1 issue for another day. 558 U.S. at 304–05 (“Because the resolution of this case
2 does not turn on them, we leave for another day the questions of how and when
3 § 2254(e)(1) applies in challenges to a state court’s factual determinations under
4 § 2254(d)(2).”). Other courts facing this issue have not found the differences
5 between § 2254(d)(2) and (e)(1) necessarily determinative. *See e.g., Murray v.*
6 *Schriro*, 745 F.3d at 1001 (“[W]e do not believe the difference between our two
7 lines of cases is determinative in this case, and thus we need not resolve the
8 apparent conflict to decide this case.”).

9 Petitioner argues that this Court should not defer to the state court’s factual
10 findings because the state court’s opinion relied on an unreasonable determination
11 of the facts. *See* ECF No. 34 at 5–7. This Court addresses each of Petitioner’s
12 factual complaints below and finds that the state court’s conclusions were not an
13 unreasonable determination of facts.

14 For the most part, Petitioner contests disputed issues of fact that were
15 presented to the jury, now looking at those facts and inferences from those facts in
16 his favor. The jury rejected Petitioner’s alibi defense and this Court cannot know
17 which predicate facts were accepted, rejected or ignored by the jury in its
18 collective determination of guilt. Petitioner complains that the countervailing
19 evidence is relevant “when considering the strength of the state’s case against
20 Petitioner in comparison with the evidence against Lisa Ulrich – the evidence and

1 theory he was not permitted to present at trial.” ECF No. 34 at 20. As discussed
2 below, Petitioner is completely mistaken that he was not permitted to present this
3 evidence and theory at trial, he chose to present a different theory and is not
4 permitted to now construct an alternative closing argument on habeas.

5 This Court has already found that Detective Mantel’s report is not material
6 and thus Petitioner’s factual contentions regarding the user initiated computer
7 activity at 8:07 p.m. are moot. *See* ECF Nos. 51; 34 at 7–16. This Court considers
8 the conflicting facts regarding DNA testing and waiver of the third party
9 perpetrator defense in the second section of this Order. ECF No. 34 at 16–19.

10 This Court finds that the state court did not rely on an unreasonable
11 determination that Mr. Hilton sold a .45 caliber handgun after the murders. *Id.* at
12 19–20. The state court remarked that a witness identified Mr. Hilton in court as the
13 seller of a .45 caliber handgun and a .22 caliber rifle. Yet, the court also outlined
14 Mr. Hilton’s conflicting testimony that he sold his last .45 caliber handgun in 2001.
15 ECF No. 16-1 at 74. While Petitioner argues that the witness was thoroughly
16 discredited, this Court finds that the state court did not unreasonably determine the
17 facts. The state court did not make a determination as to when Mr. Hilton sold his
18 handgun, but merely stated that the jury disbelieved his alibi defense and found
19 him guilty. ECF Nos. 16-1 at 74; 34 at 19.

1 While Petitioner debates the nuisances of “clasped” and “affixed” in regards
2 to the sticky note in Mr. Ulrich’s hand, this Court finds that the state court’s
3 description was reasonable. ECF No. 34 at 20. Petitioner argues that the
4 photographs better demonstrate the unusual position of the sticky note, illustrating
5 how Lisa Ulrich could have put the fake receipt in her father’s hand to direct the
6 investigation towards Mr. Hilton. *Id.* After reviewing the photographs, *e.g.*, ECF
7 No. 49 at Trial Exhibits 83, 84, 103, this Court determines that the state court did
8 not make an unreasonable determination of the facts in its description of where the
9 sticky note was found. Indeed, the defense argued to the jury that the note was
10 planted. ECF No. 23-1 at 3850–53 (Ex. 57). The jury heard the testimony and had
11 the photographs in evidence. It was for the jury to decide the relevance of that note
12 and its location.

13 Petitioner claims the state court wrongly determined the receipt was “signed
14 by Josephine Ulrich” when another receipt in evidence shows someone traced over
15 Jo Ulrich’s signature and Petitioner speculates that someone was practicing the
16 ability to copy her handwriting. ECF No. 34 at 21; Trial Exhibit 1. This Court
17 finds that the state court properly described the signature on the receipt. Lisa
18 Ulrich testified to the jury that it was her mother’s signature. ECF No. 20-1 at
19 1307-10 (Ex. 39). Again, the defense argued to the jury that in addition to the
20 evidence that the note was planted, there was evidence someone had been tracing

1 over somebody's handwriting in order to leave a false receipt. ECF No. 23-1 at
2 3884–85 (Ex. 57). In any event, all the receipts were admitted into evidence and
3 the jury could decide the issue for themselves.

4 Additionally, Petitioner disputes the state court's characterization that the
5 missing receipt book was kept "openly" on top of the refrigerator. ECF Nos. 34 at
6 21. The state court observed that "Jennifer and Lisa [Ulrich] both testified that the
7 receipt book currently in use was kept openly on top of the refrigerator." ECF No.
8 17-2 at 211. Petitioner merely argues whether anything is kept openly on top of
9 the refrigerator in a room separate from where visitors are permitted. ECF No. 34
10 at 21. This Court does not find Petitioner's contention persuasive when the
11 openness of a book is not defined by the room it occupies. Petitioner fails to
12 establish that the state court made an unreasonable determination in its description
13 of the daughters' testimonies.

14 Accordingly, this Court finds that the state court's rejection of Petitioner's
15 claims was not an unreasonable determination of the facts in light of the evidence
16 presented in the state court proceeding.

17 **II. Unreasonable Application of Clearly Established Federal Law**

18 A rule is "clearly established Federal law" within the meaning of section
19 2254(d) only if it is based on "the holdings, as opposed to the dicta, of [the
20 Supreme Court's] decisions." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)

1 (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012)). A state court’s decision is
2 contrary to clearly established Supreme Court precedent “if it applies a rule that
3 contradicts the governing law set forth in [Supreme Court] cases or if it confronts a
4 set of facts that are materially indistinguishable from a decision of [the Supreme
5 Court] and nevertheless arrives at a result different from [Supreme Court]
6 precedent.” *Early v. Packer*, 537 U.S. 3, 8 (2002) (internal quotation marks
7 omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). The state
8 court need not cite to the controlling Supreme Court precedent, nor need it even be
9 aware of the relevant case law, “so long as neither the reasoning nor the result of
10 the state-court decision contradicts them.” *Id.* “[A]n unreasonable application of”
11 clearly established federal law is one that is “objectively unreasonable, not merely
12 wrong; even clear error will not suffice.” *White*, 134 S.Ct. at 1702 (internal
13 quotation marks and citation omitted). Of utmost importance, circuit precedent
14 may not be used “to refine or sharpen a general principle of Supreme Court
15 jurisprudence into a specific legal rule that [the Supreme] Court has not
16 announced.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam).

17 In order to obtain a writ of habeas corpus, “a state prisoner must show that
18 the state court’s ruling on the claim being presented in federal court was so lacking
19 in justification that there was an error well understood and comprehended in
20 existing law beyond any possibility for fairminded disagreement.” *Id.* (quoting

1 *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). Under the harmless error
2 standard of review adopted by the Supreme Court, even if a reviewing court finds
3 constitutional error, the challenged error must have caused “actual prejudice” or
4 had “substantial and injurious effect or influence” in determining the jury’s verdict
5 in order for the court to grant habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619,
6 637 (1993) (citation omitted).

7 If [the section 2254(d)] standard is difficult to meet, that is because it was
8 meant to be It preserves authority to issue the writ in cases where there is no
9 possibility fairminded jurists could disagree that the state court’s decision conflicts
10 with [the Supreme] Court’s precedents. It goes no further. Section 2254(d)
11 reflects the view that habeas corpus is a “guard against extreme malfunctions in the
12 state criminal justice systems,” not a substitute for ordinary error correction
13 through appeal. As a condition for obtaining habeas corpus from a federal court, a
14 state prisoner must show that the state court’s ruling on the claim being presented
15 in federal court was so lacking in justification that there was an error well
16 understood and comprehended in existing law beyond any possibility for
17 fairminded disagreement. *Harrington*, 562 U.S. at 102–03 (citations omitted).

18 The petitioner bears the burden of showing that the state court decision is
19 contrary to, or an unreasonable application of, clearly established precedent. *See*
20 *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). In conducting its habeas

1 review, a federal court looks “to the last reasoned decision of the state court as the
2 basis of the state court’s judgment.” *Merolillo v. Yates*, 663 F.3d 444, 453 (9th
3 Cir. 2011) (citation omitted). A rebuttable presumption exists: “Where there has
4 been one reasoned state judgment rejecting a federal claim, later unexplained
5 orders upholding that judgment or rejecting the same claim rest upon the same
6 ground.” *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

7 **Claim 1: Denial of Due Process**

8 Petitioner contends that he was denied due process because the State
9 presented false or misleading evidence and argument. ECF Nos. 9 at 1; 34 at 21.
10 “The principle that a State may not *knowingly* use false evidence ... to obtain a
11 tainted conviction, [is] implicit in any concept of ordered liberty.” *Napue v.*
12 *People of State of Ill.*, 360 U.S. 264, 269 (1959) (emphasis added). To
13 demonstrate a constitutional violation under *Napue*, Petitioner must show: “(1) the
14 testimony (or evidence) was actually false, (2) the prosecution knew or should
15 have known that the testimony was actually false, and (3) the false testimony was
16 material.” *Sanders v. Cullen*, 873 F.3d 778, 794 (9th Cir. 2017).

17 First, Petitioner contends that the State presented false testimony regarding
18 the timing of computer usage and the murder timelines because Detective Mantel’s
19 report found that “user initiated activity” on the Ulrichs’ computer ended at 8:07
20 p.m. ECF Nos. 16-1 at 76; 9 at 2–3. This Court has already addressed this issue in

1 its Order Denying Petitioner’s Motion for Discovery. ECF No. 51. This Court
2 found that the state court’s determination was reasonable when it determined that
3 “user initiated activity” does not show that someone was physically on the Ulrichs’
4 computer at 8:07 p.m. *Id.* at 7–8. The state court determined that “Mr. Hilton is
5 unable to point to any false or misleading evidence or information that was relied
6 on, secreted, or proffered by the State.” ECF No. 16-1 at 95 (Ex. 3).

7 Regardless of whether someone was on the computer, it was reasonable for
8 the state court to find that Mr. Hilton would still not be entitled to relief. *See* ECF
9 Nos. 51 at 8; 16-1 at 23–31 (Ex. 3). This Court has already addressed that
10 Detective Mantel’s report does not make the State’s theory impossible when the
11 Ulrichs’ murders occurred anywhere between 6:00 to 10:00 p.m. ECF Nos. 51 at
12 8; 16-1 at 88. This Court also notes that the State supplied Defense counsel with a
13 copy of Detective Mantel’s report before Mr. Hilton’s first trial. ECF No. 16-1 at
14 76–77 (Ex. 3). The State did not conceal Detective Mantel’s report from Petitioner
15 nor is it clear that this information would have affected the jury’s verdict where
16 Mr. Hilton could have committed the murders within the four hour time span even
17 if someone was physically operating the Ulrichs’ computer at 8:07 p.m. Moreover,
18 at trial, Petitioner testified from his internet service provider’s records that he was
19 at home using the internet at 5:42 p.m., 6:20 p.m., 7:41 p.m. and at 7:58 p.m. for
20 nearly 12 minutes. ECF No. 23-1 at 3602–03, 3612 (Ex 55). The defense argued

1 this alibi to the jury in closing. ECF No. 23-1 at 3882–83 (Ex. 57). This Court
2 finds that Petitioner fails to show that the State knowingly presented any false
3 evidence material to the outcome of the trial.

4 Second, Petitioner argues that the State falsely asserted at trial that DNA
5 testing excluded Lisa Ulrich as the source of DNA on the shell casings. ECF No. 9
6 at 4. At trial, but not before the jury, the State proposed to offer a 2008 DNA test
7 excluding Lisa Ulrich as the source of DNA on the shell casings. ECF Nos. 9 at 4;
8 16-1 at 95–96 (Ex. 3). The State conceded that its offer of proof was mistaken and
9 that it overstated the conclusions of the DNA report. ECF No. 16-1 at 96. In any
10 event, the trial court excluded admission of the report because of its late disclosure
11 to the defense. *Id.* The state appellate court emphasized that “[t]he offer of proof
12 was not made in connection with any argument about the sufficiency of evidence
13 to support a third party perpetrator theory.” *Id.* The court stated that when
14 determining the insufficiency of Mr. Hilton’s third party perpetrator evidence in
15 the second appeal, “no consideration was given to the possibility that DNA
16 evidence that was never admitted might have cut against the theory.” *Id.*

17 This Court finds that the state appellate court’s determination is reasonable
18 and Petitioner fails to establish that the prosecution’s error in any way affected the
19 jury’s decision or the appellate decisions. This Court concludes that this error does
20 not constitute false or misleading evidence that reasonably affected the jury’s

1 verdict when the mistaken statement was not offered as evidence, merely an offer
2 of proof, and was not mentioned to the jury. Moreover, the defense argued to the
3 jury during closing that Petitioner's DNA was not found, only an unidentified
4 female's DNA was found. ECF No. 23-1 at 3881 (Ex. 57).

5 Accordingly, as to Petitioner's claim that the state presented false and
6 misleading evidence, this Court finds the state court's conclusions were neither an
7 unreasonable determination of the facts nor an unreasonable application of the
8 clearly established constitutional law as set forth by *Napue*.

9 **Claim 2: *Brady* Violation**

10 Petitioner contends that he was denied due process when the State withheld
11 exculpatory evidence regarding the timing of the computer usage in violation of
12 *Brady v. Maryland*. ECF Nos. 9 at 4; 34 at 22. Respondent insists the state court
13 reasonably rejected this claim because Detective Mantel's report was disclosed to
14 the defense and the Fluckiger report was not material. ECF No. 15 at 32.

15 "A *Brady* violation occurs when the government fails to disclose evidence
16 materially favorable to the accused." *Youngblood v. W. Virginia*, 547 U.S. 867,
17 869 (2006) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). A court should
18 find that evidence is material "only if there is a reasonable probability that, had the
19 evidence been disclosed to the defense, the result of the proceeding would have
20 been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A reasonable

1 probability is a probability sufficient to undermine confidence in the outcome.” *Id.*
2 (internal quotation marks omitted). “To state a claim under *Brady*, the plaintiff
3 must allege that (1) the withheld evidence was favorable either because it was
4 exculpatory or could be used to impeach, (2) the evidence was suppressed by the
5 government, and (3) the nondisclosure prejudiced the plaintiff.” *Smith v. Almada*,
6 640 F.3d 931, 939 (9th Cir. 2011) (citation omitted). A *Brady* violation does not
7 exist in a case in which the allegedly suppressed evidence is known by the defense.
8 *See United States v. Dupuy*, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) (“Since
9 suppression by the Government is a necessary element of a *Brady* claim, if the
10 means of obtaining the exculpatory evidence has been provided to the defense, the
11 *Brady* claim fails.”) (citations omitted).

12 Here, Petitioner asserts that had trial counsel known of Mr. Fluckiger’s
13 confirmation of Detective Mantel’s analysis, they would have interviewed Mr.
14 Fluckiger and called him to testify at trial. ECF Nos. 9 at 6; 34 at 24. In
15 December 2002, the prosecution asked a Kennewick police detective to provide
16 Detective Mantel’s work to J.D. Fluckiger of Battelle, a private company that
17 manages a national laboratory for the U.S. Department of Energy in Richland.
18 ECF No. 16-1 at 77 (Ex. 3). On February 4, 2003, the prosecution wrote a letter to
19 defense counsel that his office was working with Battelle to see if its personnel
20 might be able to review the hard drives and provide the testimony that would have

1 been provided by Detective Mantel. *Id.* There was no further mention of Mr.
2 Fluckiger and neither party called Mr. Fluckiger or Detective Mantel at either trial.
3 *Id.* at 78. Mr. Fluckiger merely looked at Detective Mantel's presentation and
4 explained it to the prosecutor, in terms he could understand. He stated that the
5 report was "fairly sound," but did not go into the EnCase files to determine what
6 was there. *Id.*

7 The Washington Court of Appeals found that Mr. Hilton could not establish
8 that Mr. Fluckiger's assessment was material. *Id.* at 84. The court stated that "Mr.
9 Fluckiger could add nothing, because he did not examine the actual files in the
10 computer and did not look at the hard drive. He did no analysis of his own and
11 never issued a report." *Id.* Yet, Petitioner contends that the state court
12 unreasonably applied the materiality test. ECF No. 34 at 25. Petitioner argues that
13 the question is whether "the favorable evidence could reasonably be taken to put
14 the whole case in such a different light as to undermine confidence in the verdict,"
15 not whether the remaining evidence is sufficient to support the jury's conclusion.
16 *Id.*; *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 304 (3d Cir.
17 2016) (citation omitted).

18 An opinion that Detective Mantel's report was "fairly sound" by someone
19 who did not review the actual files or hard drive does not constitute material
20 evidence in favor of Petitioner. Even when viewing the case in light of the Third

1 Circuit standard as espoused by Petitioner, Mr. Fluckiger’s assessment does not put
2 the whole case in such a different light as to undermine confidence in the jury’s
3 verdict. Nondisclosure of Mr. Fluckiger’s assessment does not undermine
4 confidence in the outcome. Accordingly, this Court finds the state court’s
5 conclusions were neither an unreasonable determination of the facts nor an
6 unreasonable application of the clearly established constitutional law as set forth
7 by *Brady*.

8 **Claim 3: Ineffective Assistance of Counsel**

9 A defendant in criminal proceedings has a constitutional right to effective
10 assistance of counsel. U.S. Const. amend. VI. A defendant asserting violation of
11 his constitutional right to effective assistance of counsel must demonstrate the
12 following: (1) “that counsel’s representation fell below an objective standard of
13 reasonableness,” and (2) “that there exists a reasonable probability that, but for
14 counsel’s unprofessional errors, the result of the proceeding would have been
15 different.” *Kimmelman v. Morrison*, 477 U.S. 365, 374–75 (1986) (citing
16 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Regarding the first
17 prong, a “tactical decision about which competent lawyers might disagree” does
18 not qualify as objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 702 (2002).
19 “Judicial scrutiny of counsel’s performance must be highly deferential,” and “a
20 court must indulge a strong presumption that counsel’s conduct falls within the

1 wide range of reasonable professional assistance[.]” *Strickland*, 466 U.S. at 689.
2 Additionally, habeas courts must be deferential not only to the decisions of defense
3 counsel, but also to the decisions of the state courts as required under 28 U.S.C.
4 § 2254(d)(1). *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

5 Here, Petitioner asserts that trial counsel was ineffective for failing to
6 investigate and present Detective Mantel’s report. ECF No. 34 at 26. Petitioner
7 argues that the state court unreasonably applied the *Strickland* sufficiency of the
8 evidence test rather than the correct prejudice test. *Id.* Petitioner argues that
9 *Strickland*’s prejudice prong turns on whether there is a reasonable likelihood of a
10 different result from the missing evidence. *Id.* The state court found that “any
11 deficient performance by Mr. Hilton’s lawyers did not rise to prejudice when the
12 premise that a person was physically present at the Ulrich’s keyboard is purely
13 speculative.” ECF No. 16-1 at 105. This Court has already determined that the
14 state court’s finding on this issue was reasonable. *See* ECF No. 51.

15 This Court agrees that trial counsel’s failure to introduce evidence of
16 Detective Mantel’s report does not rise to the level of prejudice and the state court
17 properly applied *Strickland*. This Court finds that a reasonable probability does
18 not exist that, but for counsel’s failure to investigate the Mantel report, the result of
19 the proceeding would have been different. The state court properly applied
20 *Strickland* when it found there was no prejudice because the physical presence of

1 someone on the Ulrichs' computer was merely speculative, meaning a different
2 result is not reasonably likely. Giving deference to the state court as required in a
3 habeas proceeding, this Court concludes that Petitioner was not prejudiced by any
4 deficiency of counsel in regards to the Mantel report.

5 Additionally, Petitioner alleges that trial counsel intended to present a
6 defense that Lisa Ulrich actually committed the murders, but their failure to make
7 an adequate record to preserve the issue for appeal fell below the standard of
8 reasonableness. ECF No. 9 at 8. Petitioner argues that trial counsels' failure to
9 preserve this issue prejudiced Mr. Hilton by precluding the Washington Court of
10 Appeals from considering the trial court's exclusion of this theory on direct appeal.
11 He also argues that it prejudiced his personal restraint petition because the
12 Washington Court of Appeals adhered to the conclusion that trial counsel never
13 intended to present this theory. *Id.*

14 The state court found that Petitioner was not prejudiced by any performance
15 or omissions of counsel with respect to the Lisa Ulrich third party perpetrator
16 defense. ECF No. 16-1 at 109. Apparently as a tactical decision, the defense
17 argued the deficiencies in the state's case rather than to prove Lisa Ulrich
18 committed the crimes "because the case against her was so weak that it would have
19 made the defense look desperate[.]". *Id.* at 37, 108–09. The court determined that
20 Petitioner did not present additional and sufficient third party perpetrator evidence

1 for consideration by a jury. *Id.* Therefore, the state court concluded that Petitioner
2 was unable show prejudice under *Strickland* given the lack of relevant, admissible
3 third party perpetrator evidence. *Id.* at 118.

4 This Court addresses Petitioner’s fourth claim below and agrees with the
5 state court that Petitioner was not prejudiced by any deficiency of trial counsel to
6 preserve the third party perpetrator defense for appeal when the Washington Court
7 of Appeals twice considered the merits of Petitioner’s argument and found it
8 insufficient. Petitioner is unable to establish that there exists a reasonable
9 probability that, but for counsel’s error in not preserving the issue on appeal, the
10 result of the proceeding would have been different where the Court of Appeals still
11 considered the issue and found a lack of admissible evidence for this defense.
12 Accordingly, this Court denies Petitioner’s claim for ineffective assistance of
13 counsel as the state court did not unreasonably apply clearly established federal
14 precedent.

15 **Claim 4: Right to Present a Defense**

16 “[T]he Constitution guarantees criminal defendants a meaningful
17 opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690
18 (1986) (internal quotation marks and citation omitted). While the Constitution thus
19 prohibits the exclusion of defense evidence under rules that serve no legitimate
20 purpose or that are disproportionate to the ends that they are asserted to promote,

1 well-established rules of evidence permit trial judges to exclude evidence if its
2 probative value is outweighed by certain other factors such as unfair prejudice,
3 confusion of the issues, or potential to mislead the jury. *Holmes v. South Carolina*,
4 547 U.S. 319, 326 (2006). *Holmes* is the most recent and clearest Supreme Court
5 articulation of the right to introduce third-party perpetrator evidence. The Court
6 held that the Constitution permits judges “to exclude evidence that is
7 repetitive . . . , only marginally relevant or poses an undue risk of harassment,
8 prejudice, or confusion of the issues.” *Holmes*, 547 U.S. at 326–27 (citation,
9 quotation and brackets omitted). The Supreme Court recognized the specific
10 application of this principle articulated in 41 C.J.S., Homicide § 216, pp. 56–58
11 and 40A Am. Jur. 2d, Homicide § 286, pp. 136–138 (1999):

12 Evidence tending to show the commission by another person of the
13 crime charged may be introduced by accused when it is inconsistent
14 with, and raises a reasonable doubt of, his own guilt; but frequently
15 matters offered in evidence for this purpose are so remote and lack
16 such connection with the crime that they are excluded. . . [T]he
17 accused may introduce any legal evidence tending to prove that
18 another person may have committed the crime with which the
19 defendant is charged [Such evidence] may be excluded where it
20 does not sufficiently connect the other person to the crime, as, for
example, where the evidence is speculative or remote, or does not
tend to prove or disprove a material fact in issue at the defendant’s
trial.

19 The Court observed that the South Carolina Supreme Court adopted a rule
20 apparently intended to be of this type articulated as follows:

1 [E]vidence offered by accused as to the commission of the crime by
2 another person must be limited to such facts as are inconsistent with
3 his own guilt, and to such facts as raise a reasonable inference or
4 presumption as to his own innocence; evidence which can have (no)
5 other effect than to cast a bare suspicion upon another, or to raise a
6 conjectural inference as to the commission of the crime by another, is
7 not admissible. . . . [B]efore such testimony can be received, there
8 must be such proof of connection with it, such a train of facts or
9 circumstances, as tends clearly to point out such other person as the
10 guilty party.

11 *Holmes*, 547 U.S. at 328 (citing *State v. Gregory*, 198 S.C. 98, 104–05, 16 S.E.2d
12 532, 534–35 (1941)). In *Holmes*, however, the South Carolina Supreme Court
13 radically changed and extended the rule, stating that “where there is strong
14 evidence of [a defendant’s] guilt, especially where there is strong forensic
15 evidence, the proffered evidence about a third party’s alleged guilt” may (or
16 perhaps must) be excluded.” *Holmes*, 547 U.S. at 329 (citing *Gregory*, 361 S.C. at
17 342, 605 S.E.2d at 24). The Supreme Court found this rule to be arbitrary in the
18 sense that it does not rationally serve the end that the *Gregory* rule and other
19 similar third-party guilt rules were designed to further. *Id.* at 331. The Court
20 found the rule to violate a criminal defendant’s right to have a meaningful
opportunity to present a complete defense. *Id.*

Here, Petitioner asserts that the state court denied his constitutional right to
present a defense when the court prohibited him from presenting his theory that
Lisa Ulrich committed the murders. ECF Nos. 9 at 9; 34 at 27. That is not what

1 happened. ECF No. 16-1 at 33 (Ex. 2) (“The initial problem with this approach is
2 that he never attempted to make that argument in the trial court.”). On direct
3 appeal, the Washington Court of Appeals further held:

4 Here, defense counsel at trial objected to the State’s motion in limine
5 only to the extent that it could be read as limiting the cross-
6 examination of Lisa Ulrich. Both in writing and orally to the trial
7 court, defense counsel disclaimed any interest in pursuing a third
8 party suspect theory. There was no offer of proof setting forth
9 sufficient evidence to put forth the theory. The most that can be said is
10 that the defense wanted to point out that the case against their client
11 was no stronger than a case against Lisa Ulrich would be. CP at 626-
12 627. That is not the same as arguing that she actually committed the
13 murder.

14 The defense did not want to actually blame Ms. Ulrich for her parents’
15 murders at trial. The defense theory cannot now be amended to argue
16 what it did not desire to argue before. The challenge to the trial court’s
17 in limine ruling on third party suspects was waived.

18 * * *

19 The trial court properly allowed the defense wide scope to cross-
20 examine Ms. Ulrich; there was little the defense was precluded from
doing. Mr. Hilton was allowed to develop her alleged bias against
him, to explore inconsistent testimony for memory lapses, and to
inquire about supposedly suspicious behavior that evening. Mr.
Hilton’s counsel accomplished what he told the court prior to trial he
wanted to accomplish.

ECF No. 16-1 at 34, 36 (Ex. 2). Those rulings are fully borne out by the trial court
record of the in limine hearing, ECF No. 18-1 at 198–210 (Ex. 31), Petitioner’s

1 briefing to the trial court on this issue, ECF No. 17-2 at 928–34 (Ex. 17),¹ and the
2 trial transcript of Lisa Ulrich’s testimony on cross-examination, ECF 20-1 at 1326–
3 73, 1379–81 (Ex. 39). Petitioner has not shown these determinations to be
4 objectively unreasonable nor has he shown clear and convincing evidence to the
5 contrary.

6 Petitioner argues that the evidence against Lisa Ulrich provides a
7 circumstantial case at least as equally strong as the case against Mr. Hilton. ECF
8 No. 34 at 33. Petitioner proceeds to outline his theory of the case as to Lisa
9 Ulrich’s motive, opportunity, ability, and framing of Mr. Hilton. *Id.* at 35–38.
10 Petitioner argues that if the jury had heard his theory implicating Lisa Ulrich, there

11
12 ¹ This reference to Petitioner’s contemporaneous briefing to the trial court is
13 more informative and places his argument and colloquy with the trial court in the
14 proper light. Petitioner’s repeated citation to his sanitized offer of proof, ECF No.
15 17-1 at 737–41 (Ex. 15), that was apparently constructed for his personal restraint
16 petition, lacks context and the full legal brief in which those facts were proffered
17 and misconstrues Petitioner’s oral argument before the trial court. Furthermore,
18 Petitioner’s repeated citation to the offer of proof is divorced from the actual facts
19 that were introduced and presented to the jury. It is not this Court’s job to ferret
20 out which facts were allowed and which were disallowed.

1 is a high probability that one juror would have entertained a reasonable doubt as to
2 Mr. Hilton's guilt. *Id.* at 39.

3 In addition to finding that Petitioner waived this argument, the state court
4 twice determined that even if Petitioner wanted to present this argument, he failed
5 to present sufficient evidence to allow him to present this theory to the jury. ECF
6 Nos. 16-1 at 34–36 (Ex. 2) (direct appeal); 16-1 at 106–09 (Ex. 3) (personal
7 restraint petition). Even more, the state court found that it was highly unlikely trial
8 counsel would have pursued this argument “because the case against her was so
9 weak that it would have made the defense look desperate.” *Id.* at 37, 109.

10 Based on the foregoing, this Court finds that the state court's rejection of
11 Petitioner's claims was neither contrary to nor involved an unreasonable
12 application of clearly established federal law as determined by the United States
13 Supreme Court, nor an unreasonable determination of the facts in light of the
14 evidence that was presented in the state court proceeding. Thus, habeas relief is
15 not warranted on these claims.

16 **III. Certificate of Appealability**

17 A petitioner seeking post-conviction relief under section 2254 may appeal a
18 district court's dismissal of his federal habeas petition only after obtaining a
19 certificate of appealability (COA) from a district or circuit judge. A COA may
20 issue only where a petitioner has made “a substantial showing of the denial of a

1 constitutional right.” See 28 U.S.C. § 2253(c)(2). A petitioner satisfies this
2 standard “by demonstrating that jurists of reason could disagree with the district
3 court’s resolution of his constitutional claims or that jurists could conclude the
4 issues presented are adequate to deserve encouragement to proceed further.”
5 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

6 This Court concludes that Petitioner is not entitled to a COA because he has
7 not demonstrated that jurists of reason could disagree with this Court’s resolution
8 of his constitutional claims or could conclude that any issue presented deserves
9 encouragement to proceed further.


10 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 11 1. Petitioner’s Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**.
12 2. Any appeal taken by Petitioner of this matter would not be taken in good
13 faith as he fails to make a substantial showing of the denial of a
14 constitutional right. Accordingly, a certificate of appealability is denied.

15 The District Court Executive is directed to enter this Order and Judgment
16 accordingly, furnish copies to the parties, and **CLOSE** the file.

17 **DATED** March 13, 2018.




THOMAS O. RICE
Chief United States District Judge